



Mahony Horner Lawyers

Trusts Act 2019

Financial Advice New Zealand
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Trusts Act 2019

Came into force on 30 January 2021:

- Makes trust law more accessible;
- Applies to all express trusts;
- Sets out mandatory and default duties;
- Improves beneficiary rights;
- Gives flexible powers and updates rules;
- Promotes the efficient resolution of trust-related disputes; and
- Provides more options to remove and appoint trustees.

Key changes

- The maximum duration of a trust is extended from 80 years to 125 years;
- There is now a limit on trustee exemption and indemnity clauses.
- The ability to delegate duties and powers;
- Trustees have a duty to keep copies of the trust deed and any variations and at least one trustee will need a full set of 'core' trust documents;
- The age of majority is now 18;
- Trustees can now use alternative dispute resolution procedures even if not specifically recorded in the trust documents; and
- There is a simplified process for replacing mentally incapable trustees.

Trustee Duties

The mandatory trustee duties are as follows:

- The duty to know the terms of the Trust;
- The duty to act in accordance with the terms of the Trust;
- The duty to act honestly and in good faith;
- The duty to hold or deal with Trust property and otherwise act for the benefit of the beneficiaries or for the permitted purpose; and
- The duty to exercise the power of the trustee for a proper purpose.

Trustee Duties

The default trustee duties are as follows:

- The general duty of care;
- The duty to invest prudently;
- The duty not to exercise any power directly or indirectly for the trustee's own benefit;
- The duty to actively and regularly consider the exercise of the trustee's powers;
- The duty not to bind or commit trustees to future exercise of discretion;
- The duty to avoid conflict of interest;
- The duty of impartiality;
- The duty not to make a profit from the trusteeship of a Trust;
- The duty to act for no reward; and
- The duty to act unanimously.

Trustees' obligations to give information to beneficiaries

- Presumption that 'basic trust information' must be made available to beneficiaries and 'trust information' be available to beneficiaries who request it.
- Basic trust information includes information that a person is a beneficiary of the trust, the name and contact details of the trustees, details of trustee changes as they occur and the beneficiary's right to request further trust information.
- Additional trust information is:
 - the trust deed;
 - any variations to the trust deed;
 - records of trust property (identifying the assets, liabilities, income and expenditure)

Trustees' obligations to give information to beneficiaries

- records of trustee decisions;
- written contracts entered into;
- accounting records and financial statements;
- change of trustee documents; and
- any other relevant trust documents.

Factors to consider

- The nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future);
- The nature and interests of other beneficiaries;
- Whether the information is subject to personal or commercial confidentiality;
- The intentions of the settlor when the trust was established;
- The age and circumstances of the beneficiary in question and the other beneficiaries of the trust;
- The effect of giving the beneficiary the information;
- The effect on the trustees, other beneficiaries of the trust, and third parties of giving the information;

Factors to consider

- The practicality of giving some or all of the information to the beneficiary in redacted form
- The practicality of imposing restrictions and other safeguards on the use of the information
- The nature and context of any request for further information; and
- Any other factor a trustee reasonably considers is relevant.

Breach of Trust and Limitation of Liability

- The Act provides the terms of a Trust must not:
- Limit or exclude a trustees liability for any breach of trust arising from dishonesty, wilful misconduct or gross negligence; or
- Provide a trustee any indemnity against the Trust property in respect of liability for breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence.

Retention of Core Trust Documents

Each Trustee must keep:

- The Trust Deed;
- Any variations made to the Trust Deed;

One trustee must keep:

- Records of the Trust property that identify the assets, liabilities, income and expenses of the Trust;
- Any records of Trust decisions;
- Any written contracts;
- Any accounting records and financial statements;
- Documents of appointment removal and discharge of trustees;
- Administration documents;
- Any documents referred to above that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.

Appointment and Discharge of Trustees

- Exercise power honestly and in good faith, and for proper purpose.
- The person nominated in the trust deed can appoint and remove trustees.
- If no one is nominated in the trust deed or the nominated person is unable or unwilling to act, the remaining trustees have the power of appointment and removal.

Appointment and Discharge of Trustees

No nominated person or remaining trustee who is able or willing to act, then:

- power to remove and replace a trustee may be exercised by:
 - a property manager of a trustee;
 - the attorney of a trustee who has lost capacity; or
 - the liquidator of a corporate trustee.
- retiring trustee may appoint a replacement;
- executor or administrator of deceased trustee may appoint a replacement; and
- the High Court may appoint a trustee.

Alternative Dispute Resolution

The provisions relating to ADR include provisions providing for—

- the power of a trustee to refer an internal or external trust matter to ADR;
- the power of the court to appoint representatives for unascertained or incapacitated beneficiaries;
- the power of a court to require an ADR process; and
- the trustee's liability in relation to an ADR settlement.

Conclusion

- Trustee obligations are more onerous
- The Act is clear about what is expected of Trustees
- The Act clearly sets out the extent of beneficiaries rights
- Consider the future of the Trust
- Make sure trustees are meeting their obligations as a Trustee



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